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Supreme Court of the United States

OCTOBER TERM, 1947

No. 434

ETTA S. ASBELL, PETITIONER,

versus

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

No. 435

ETTA S. ASBELL, PETITIONER,

versus

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Etta S. Asbell respectfully shows to the Court:

A. Summary Statement of the Matter Involved.

This is a petition for writs of certiorari directed to the United States Circuit Court of Appeals for the Fourth Cir-

cuit to review the judgments entered by it in two cases, the appeals in which were "combined and prosecuted together upon one and the same transcript of record," as provided in a consent order of the District Court filed February 10, 1947. This order is entitled in both cases and first recites that "The issues in the actions above entitled being substantially the same, the actions were tried together by direction of this Court, with the assent of counsel for the parties." Both cases were disposed of in one opinion which was filed in the court below on August 2, 1947 (R. 64). The judgments below were filed and entered August 2, 1947 (R. 68, 87). A petition for rehearing was filed in time (R. 69) and was denied in an order filed September 11, 1947 (R. 85). The mandate was sent to the district court on September 18, 1947 (R. 85).

The last paragraph of the stipulation of counsel, subject to the approval of this Court, provides:

> "It Is Further Stipulated and Agreed that petitioner may file one petition for the two writs of certiorari and that the same may be heard upon one and the same record, and that all further proceedings herein may be taken under the combined captions of the two cases upon one and the same record." (R. 89.)

The two suits were commenced in the Court of Common Pleas for Saluda County, South Carolina, on May 15, 1946, by the same attorneys for plaintiff. Both defendants were represented by the same attorneys. Both suits were removed to the United States District Court for the Western District of South Carolina, Greenwood Division, on the ground of diversity, based on the respective allegations that the defendants were corporations of other States. The two cases were tried together before District Judge George Bell Timmerman and a jury on December 12-13, 1946.

The complaint in the first suit contains two causes of action based, respectively, on the double indemnity provisions of two policies of life insurance issued by the Mutual Life Insurance Company on the life of Albert L. Asbell—one for $5,000.00, and the other for $2,000.00. The provisions of both policies, which are the usual ones and which are identical as applied to the admitted facts, stipulate that insurer will pay double indemnity "upon receipt of due proof that the insured died as a direct result of bodily injury effected solely through external, violent, and accidental means, independently and exclusively of all other causes, * * * and that such death occurred within 90 days after the date of such injury; provided that the Double Indemnity shall not be payable if death resulted * * * directly or indirectly from disease or bodily or mental infirmity." (R. 26-28.) Insurer had paid the ordinary death benefits provided for in both policies under a non-prejudice agreement.

Both complaints allege that insured suffered an accidental fall on December 6, 1945, and underwent the next day a major surgical operation under a general anesthetic, which was made necessary thereby, and died as a direct result of such bodily injuries on December 29, 1945. Plaintiff is the widow of insured and the beneficiary under both policies and the certificate.

The complaint against The Travelers Protective Association of America is predicated on a certificate of membership held by said Albert L. Asbell, of which plaintiff, his wife, is beneficiary, whereby and pursuant to its constitution said Association contracted to pay $5,000.00, if insured should "independently of all other causes, through external, violent and accidental means, receive bodily injuries which shall solely and exclusively cause death * * *." (R. 28.)

The defense in both cases was based on the factual contention that insured was suffering from a disease of the heart or coronary arteries prior to and at the time of the accident on December 6, 1945, which contributed as an essential factor in his death on December 29, 1945, and the legal contention that this relieved defendants of liability under the insuring clauses above quoted and excepting clauses in the policies and the constitution, which had the same legal effect.

Defendants' factual contention was based primarily on the evidence of Dr. L. Emmet Madden, a physician specializing in internal medicine in Columbia, S. C., who testified on direct that insured was under his care in the Columbia Hospital from the 3rd to the 17th of January, 1942, and that he diagnosed insured's condition at that time as coronary thrombosis, based on an arteriosclerotic conditon or disease of the affected blood vessel in his heart (R. 15-16). On the other hand, plaintiff relied strongly on the cross and re-direct examination of Dr. Madden as compelling or justifying the reasonable inference that insured had completely recovered from this attack more than three and one-half years prior to the fall, and that the fall and its consequences were the sole cause of death. (R. 58-61 and letter at R. 24.) The evidence is discussed in the brief filed herewith.

Neither defendant contended, however, that the major operation, which was necessitated by the accident and took two hours and twenty minutes, or the general anesthetic under which it was performed—the shock of both of which contributed to the death—was effective under any of the excepting clauses to relieve either defendant of liability. The defense was limited to the contention that the alleged disease pre-existing the accidental fall was the basis of non-liability.

Plaintiff consistently contended that there was substantial evidence making three issues for the jury, and that a favorable finding by the jury on any one of these would and did support the verdicts for plaintiff—such three issues being: (1) Had insured ever suffered from heart disease or hardening of the arteries? (2) If so, had insured recovered therefrom prior to the accident? (3) If the disease existed at the time of the accident, did it contribute as an essential factor in the fatal result, or was it a mere condition? And as a material factual factor on all three issues, plaintiff contended in both courts below, and now contends, that there was substantial lay testimony, apart from the medical evidence, upon which the jury could reasonably conclude that the severe injuries received by insured in the fall, plus the shock of the major operation the following day, together caused the coronary occlusion or thrombosis that caused death.

Both defendants made motions for directed verdicts on the single ground above outlined (R. 4-5), which Judge Timmerman denied after hearing full arguments thereon (R. 5-6). The jury rendered verdicts for plaintiff—$7,731-.00 against Mutual and $5,246.67 against T. P. A.—representing the face of the policies and certificate, respectively, together with interest from the date that admittedly they should have been paid, if defendants were liable. Judgments were entered in favor of plaintiff on these verdicts (R. 3-4).

Defendants made appropriate motions for judgment *non obstante veredicto* under Rule 50(b) of the Federal Rules of Civil Procedure on the same ground of their motions to direct (R. 6). These were refused by Judge Timmerman, after argument by defendants' counsel, in identical orders filed January 22, 1947, in each of which he said: "I was of opinion, following extensive argument of the motion

to direct a verdict, that there were substantial conflicts in the evidence, making issues for the jury. These were submitted under a charge to which no exception was taken. I am still of that opinion." (R. 6-7.)

The double indemnity and excepting provisions of the two policies and the accident and excepting provisions of the certificate-constitution of the T. P. A. were construed and applied by the district judge according to the rule laid down by the court below in two cases which were tried in district courts in South Carolina, to wit, *Jefferson Standard Life Ins. Co. v. Lightsey* (CCA-4), 49 F. (2) 586, and *Life Ins. Co. of Virginia v. Rhodes* (CCA-4), 71 F. (2) 413. The court below affirmed judgments for plaintiffs in both cases and construed such provisions to mean that "a diseased condition of the insured, unless an essential factor in the fatal result, would not prevent a recovery under the policy in suit," having previously pointed out "the true distinction between a pre-existing condition of the insured and a cause of death." This rule was followed by Judge Timmerman in his charge, in the absence of any South Carolina decision construing similar provisions. No exception was taken to the charge. The result was that the only substantial question argued, considered and decided in both courts below was whether there was sufficient evidence to support the verdicts of the jury in favor of plaintiff. The Court of Appeals decided this question in the negative, reversed the judgments and remanded the cases to the District Court, with direction to enter judgments for defendants in accordance with Rule 50(b) of the Federal Rules of Civil Procedure.

B. Basis of the Court's Jurisdiction.

It is competent for this Court to require by certiorari that these causes be certified to it for determination pur-

suant to the Act of February 13, 1935, c. 229, Section 1, 43 Stats. 938, amending and re-enacting Section 240(a) of the Judicial Code; 28 U. S. C. A. Section 347.

C. Questions Presented.

1. Whether the Circuit Court of Appeals denied trial by jury to petitioner, in violation of the Seventh Amendment of the Federal Constitution, in holding that there was no evidence which presented a substantial basis for the submission of the cases to the jury, in that said Court misconstrued the evidence of the two medical witnesses which it emphasized, and disregarded substantial conflicts in such evidence, and in so doing failed to give effect to the rule laid down by this Court in *Tennant v. Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35, 88 L. Ed. 520, 525?

2. Whether the Circuit Court of Appeals erred in holding in effect that the jury should have "indolently accepted" the opinions of the physicians favorable to defendants' contention, although these were in substantial conflict, and although there was substantial lay testimony which reasonably justified the verdicts; and whether, in this respect, the decision below is in direct conflict with:

(a) The decision of this Court in the *Tennant case, supra*, as well as those in *Head v. Hargrave*, 105 U. S. 45, 47-49, 26 L. Ed. 1028, and The Conqueror, 166 U. S. 110, 132, 41 L. Ed. 937, 947;

(b) The decisions of the Circuit Court of Appeals in the 1st Circuit—*Aetna Life Ins. Co. v. Allen*, 32 F. (2) 490; in the 7th Circuit—*Coyner v. U. S.* 103 F. (2) 629, 633; and in the 10th Circuit—*U. S. v. Gower*, 50 F. (2) 370, 371;

(c) The two former decisions in the 4th Circuit already referred to (*Jefferson Standard Life Ins. Co. v. Lightsey*, 49 F. (2) 586, and *Life Ins. Co. of Va. v. Rhodes*,

71 F. (2) 413), as well as *U. S. v. Taylor,* 110 F. (2) 132, wherein the *Gower case* was approved and followed on the merits; and

(d) Decisions of the Supreme Court of South Carolina, which furnish good precedent for a holding that the evidence on the trial of these cases was sufficient to make a jury issue as to whether the fall, plus the shock of the operation, was sufficient to cause the thrombosis that caused death. *Buggs v. U. S. Rubber Co.,* 201 S. C. 281, 22 S. E. (2) 881, and *Westbury v. Heslep & Thomason Co.,* 199 S. C. 124, 18 S. E. (2) 668.

D. Reasons relied on for the allowance of the writ.

1. In order that trial by jury may be preserved as intended by the Seventh Amendment, it is important that this Court should determine whether a Circuit Court of Appeals has violated the letter and spirit of the rule as to the sufficiency of the evidence so recently and positively stated by this Court in the *Tennant case,* 321 U. S. 29, 35. This Court, having there emphasized that all contradictions and inferences, as well as all questions of credibility of witnesses, are for the jury, added "That (jury) conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

2. It is important that this Court should determine whether a Circuit Court of Appeals has violated the well-established subsidiary rule as to the sufficiency of the evidence, in respect of opinions of physicians or medical experts, which is stated in *United States v. Gower,* a war risk

total disability case, C. C. A. 10th, 50 F. (2d) 370, 371, in this way:

> "• • • Moreover, expert testimony is only an aid to the solution of the main issue. It cannot be arbitrarily ignored or indolently accepted, and after it has been considered by the jury, if they believe their own experience, observations and common knowledge, as applied to the facts in the case, will guide them to a solution and verdict, they have a right to follow their own convictions, thus reached, although in doing so their verdict may be contrary to the opinion evidence of experts on the subject. *United States Smelting Co. v. Parry* (C. C. A.), 166 F. 407, 411; *Head v. Hargrave,* 105 U. S. 45, 47-49, 26 L. Ed. 1028; The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. Ed. 937; Jones on Evidence (2nd Ed.), Sec. 1373. After consideration of the evidence in the record, both that of laymen and the attending physician, as to the soldier's ailments and their effects upon him physically and mentally, we cannot hold that the proof does not sustain the verdicts."

This is a restatement of the rule of The Conqueror, 166 U. S. 110, 133, 41 L. Ed. 937, 947, to wit:

> "In short, as stated by a recent writer upon expert testimony, the ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which requires them to surrender their judgment, or to give a controlling influence to the opinion of scientific witnesses. (Citing authorities.)"

The court had previously quoted and approved the rule as stated in *Head v. Hargrave, supra,* 105 U. S. 45.

This rule was the basis of the six pertinent cases decided by the court below and the Supreme Court of South Carolina, which were cited and referred to in appellee's brief below, and is the basis of the decisions cited supra from this Court and from the Circuit Court of Appeals in

the 1st, 7th and 10th Circuits, as well as numerous and consistent decisions of the Supreme Court of South Carolina.

Petitioner respectfully submits that the court below violated these established rules in its decision of the question of the sufficiency of the evidence; and that substantial error appears from a mere reading of the opinion itself; but, if this be not so, that error will appear upon a mere reading of the simple evidence in the record.

Petitioner further submits that there has been much litigation of this kind in the federal courts and that there probably will be much more in the future because the large life insurance companies are usually foreign corporations of the several states and frequently deny liability under these double indemnity provisions and then remove the suits to the federal courts when the jurisdictional amount is involved. The question of the sufficiency of the evidence in such cases is a question of Federal practice that is not within the Erie Railroad doctrine and it is important that a decision of a Court of Appeals that seems entirely out of line with all other pertinent federal and state decisions should be reviewed and reversed, if this Court so concludes. This decision, if erroneous, will cause substantial confusion and error in the future, particularly in the Fourth Circuit.

Wherefore, petitioner prays for the allowance of writs of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit in these causes, in order that they may be reviewed and determined by this Honorable Court; and that this Court hear both cases on one and the same record, reverse the judgments of the Circuit Court of Ap-

peals and direct that the judgments of the District Court in favor of plaintiff below be reinstated.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

REFERENCE TO REPORT OF OPINION BELOW

The decision of the District Court is not reported. The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 163 F. (2) 121, advance sheet No. 1.

GROUNDS OF JURISDICTION

This Court has jurisdiction pursuant to the Act of February 13, 1935, c. 229, Section 1, 43 Stats. 938, amending and re-enacting Section 240(a) of the Judicial Code, 28 U. S. C. A., Section 347.

STATEMENT OF THE CASE

A summary statement of the case is made in the petition filed herewith under the heading "A. SUMMARY STATEMENT OF THE MATTER INVOLVED," and leave to omit the same here is prayed, for brevity's sake.

ERRORS TO BE URGED

1. The court below erred in holding that there was no evidence which presented a substantial basis for the submission of the cases to the jury, in that said court misconstrued the evidence of the two medical witnesses which it emphasized and disregarded substantial conflicts in such evidence, and in so doing failed to give effect to the rule laid down by this Court in the *Tennant case,* 321 U. S. 29, 35.

2. The court below erred in holding in effect that the jury should have "indolently accepted" the opinions of the physicians favorable to defendants' contention, although these were in substantial conflict, and although there was substantial lay testimony which reasonably supported the verdicts. And, in so holding, the decision below is in direct conflict with decisions of this Court, decisions of the Circuit Court of Appeals in the 1st, 7th and 10th Circuits, as well as with former decisions in the 4th Circuit itself, and also with a consistent line of decisions of the Supreme Court of South Carolina.

SUMMARY OF ARGUMENT

I. The court below violated the rule laid down in the *Tennant case,* 321 U. S. 29, 35.

II. The court below erred in holding in effect that the jury should have "indolently accepted" the opinions of the physicians favorable to defendants, when the lay evidence alone was sufficient to support the verdicts.

STATEMENT OF THE EVIDENCE

Lay Testimony

Plaintiff offered three lay witnesses, in addition to herself.

Mr. Joe W. Jones and Postmaster L. T. Boatwright were eyewitnesses of the fall. Their testimony was practically identical and is summarized as follows:

About one o'clock on December 6, 1945, Mr. Asbell came out of the post office on the cement sidewalk in the town of Ridge Spring. Mr. Asbell was reading a letter that he was holding in both hands, with other mail under his arm. He stepped on a ripe banana peeling with his left foot and slipped between twelve and eighteen inches; his feet went up and he just fell with practically every pound of weight he had on his left side. He hit all the way on his left side and broke his glasses across their left side. Neither witness ever saw a man fall any harder. For a second or two Mr. Asbell didn't move, and the two witnesses ran and helped him up. The undertaker happened by in his car; they put Mr. Asbell in the car, which took him home. (This testimony was not contradicted, was not printed in either appendix below, and is not printed here. Reporter's Transcript, pp. 4-10, 12-13.)

Testimony of Mrs. Asbell

Mrs. Asbell called Dr. Brunson, who came promptly, gave insured a hypodermic, and advised Mrs. Asbell to take insured to Columbia at once to see Dr. Epting, an orthopedic surgeon, who advised an operation. Mrs. Asbell called in Dr. Madden, who agreed to the operation under a general anesthetic. The operation was performed the next morning; it took two hours and twenty minutes, and insured continued under the influence of the anesthesia for

the greater part of the day. (R. 41-42.) Mrs. Asbell brought insured home in an ambulance on December 13 and he was taken direct to his room. He never left his room (except once—as stated below) or was able to attend to his affairs, before his death on December 29, 1945. Insured was not himself at all as to his normal vigor and strength; he was in shock. (R. 41-44.)

When insured was first brought home following the fall Mrs. Asbell noted the terrible blackness and swelling which set in immediately—all of his left arm. On December 28 Mrs. Asbell took Mr. Asbell to Columbia pursuant to an engagement with Dr. Epting, who examined the wound and shortened the cast. Immediately thereafter she brought him home where on the next day he was taken ill about eleven o'clock and passed away about six p. m. (R. 44-45.)

Following his first stay at the Columbia Hospital, commencing January 3, 1942, Mr. Asbell came home on January 14, 1942. About two weeks later he suffered a minor attack of influenza or colitis, for which he was given a sulfa drug by Dr. Brunson. The sulfa drug reacted with unusual severity, and, at the suggestion of Dr. Brunson, Mr. Asbell was again taken to a hospital in Columbia (the Providence) so that Dr. Madden might see him. Insured stayed at the hospital six days on this second visit; he came home March 5, 1942 (R. 35-37). Dr. Madden agreed that this was an inconsequential illness from which insured promptly recovered completely (R. 16). These are the only two illnesses of consequence that insured suffered prior to the accident on December 6, 1945 (R. 37)—almost exactly three years and nine months later. He was 61 years old when he died. (R. 38.)

Mrs. Asbell testified in detail that during their entire married life of nearly thirty-two years, excepting only the

period from January 3 to March 5, 1942, and a short while thereafter, Mr. Asbell lived a most vigorous and active life. He conducted a general merchandise business—hardware, dry goods and groceries—occupying two adjacent storerooms, with a clerk in each store; he also sold building supplies and coal; and he personally bought and sold cotton. Mr. Asbell was also regularly employed by a fertilizer company in Savannah as a fertilizer salesman-collector, and regularly traveled seven counties, driving his own auto, selling and collecting; he was paid a salary of $150.00 a month and sometimes a bonus. He personally ran and supervised three farms—two adjacent, one four miles distant from the others—and personally visited all three regularly, usually daily, sometimes twice daily. Mr. Asbell was once the mayor of the town of Ridge Spring and was town clerk for fifteen or twenty years. He was for twenty-nine years a steward in the Methodist Church and for twenty-seven years superintendent of the Sunday School. He was actively interested in the church orphanage. He enjoyed swimming. (R. 32-35.)

Mrs. Asbell testified positively and reiterated that Mr. Asbell had engaged continuously in these various activities, both prior and subsequent to the period of January 3-March 5, 1942—that he resumed these activities soon after he returned home in 1942 and continued them until the accident. She testified further that for three years prior to his accident they had no servants and that Mr. Asbell added household duties and chores to his other activities; that he arose first in the morning and made fires in two stoves; that he then went out and fed and milked a cow, and attended to hogs that they kept regularly; then after breakfast he would leave on his business activities. (R. 37-40.)

Mrs. Asbell testified, further, that Mr. Asbell would lie down in the afternoon following his noonday meal, upon

her insistence; that he thought to rest awhile would better help him carry out his duties for the afternoon—that is, of course, when his business activities permitted. (R. 38-39.)

"Q. During those years after he had been in the hospital, state whether or not he ever complained of pains in his chest or pains in his arms. A. He never complained. Q. What about shortness of breath? A. He never had any shortness of breath. Q. What can you say about the way he slept at night? A. He slept all night long entirely and his breathing was as easy as any baby's." (R. 39.) In rebuttal, Mrs. Asbell testified that Mr. Asbell had not at any time suffered from high blood pressure. (R. 46.)

Mrs. Asbell was not cross examined with respect to any of her testimony as above. Her cross examination was limited to identification of the proof of death and the attending physician's certificate therein. (R. 46.)

Mrs. Asbell's testimony as to the activities of Mr. Asbell was corroborated in some details by both Mr. Jones and Mr. Boatwright, *supra,* and also as to some details by her brother, Mr. Julian H. Scarborough, president of the Farm Credit Administration, Federal Land Bank, and Production Credit Association in Columbia. But the testimony of these witnesses was merely cumulative, except that Mr. Scarborough on cross, after having testified as to Mr. Asbell's activities following the attack of January, 1942, and stating he had heard that Mr. Asbell wasn't well at that time, added his lay opinion "And when I heard about it and saw him after that and all, I just didn't believe that he had any heart trouble in 1942." (Reporter's Transcript, 23.)

As to the Medical Testimony

It will be necessary to quote portions of this testimony in our argument under Point I and we beg leave to state

and consider all the medical testimony there—in order to avoid repetition.

ARGUMENT

Point I

The Court below misconstrued the evidence and violated the rule laid down in the Tennant case—321 U. S. 29, 35.

The opinion refers to Dr. P. A. Brunson, of Ridge Spring, as "the family physician," and to Dr. L. Emmet Madden, of Columbia, as the doctor "who testified for defendants with respect to the heart attack in 1942."

1. The opinion asserts that Dr. Brunson stated in the death certificate that death was due to "coronary occlusion or thrombosis and accidental injury" and assumes that Dr. Brunson was referring to a thrombosis in 1942. (2nd paragraph, R. 65). This is a grievous misconstruction which permeates the whole consideration given the evidence by the court below, as indicated by the opinion. Dr. Brunson did make this statement in one of the death certificates, but he also stated therein and on each of the several occasions that he testified in this respect, as later shown, that the occlusion or thrombosis to which he referred was one resulting from the fall of December 6, 1945, and that occurred after the fall and immediately preceding death on December 29, 1945. In other words, Dr. Brunson always referred to a thrombosis in December, 1945, whereas Dr. Madden always referred to a thrombosis in January, 1942.

The first certificate is printed as Plaintiff's Exhibit No. 4 at R. 25. This is entitled "Medical Certificate of Death" and is a portion of the standard certificate of death required by a statute of South Carolina. It was identified

and introduced during the direct examination of Dr. Brunson at R. 54, and received in evidence without objection. The second of these certificates was a part of the proof of death and is printed as Defendants' Exhibit "A" at R. 26, entitled "Attending Physician's Certificate." This was identified during cross examination of plaintiff, who testified that it was filled out and signed by Dr. Brunson (R. 46). It was later received in evidence without objection. (Reporter's Transcript, 114—not printed.)

It seems clear that the court below quoted "coronary occlusion or thrombosis" from the first line of Dr. Brunson's answer to question 22 of Exhibit No. 4 (R. 25). We are unable to see how the court could fairly quote that line and fail to quote also or—as it apparently did—fail to consider the next and second line of this answer reading "Date of onset: 12-29-45." (R. 25.)

We are also unable to see how the court could fairly construe Exhibit No. 4 without giving effect, or at least consideration, to question-answer 23 therein, where Dr. Brunson stated in effect that the "death was due to external causes (violence)," to wit, the accident of 12-5-45. It is inconsequential that Dr. Brunson stated the date of the accident erroneously by one day (R. 25).

We are also unable to see how the court below could fairly construe these exhibits together, as they should be construed, without considering or giving effect to question-answer 7-D of Exhibit "A", wherein Dr. Brunson again stated in effect that the death resulted from a "cause other than disease," to wit, an accident—the fall in question—concluding this answer with "He did not recover from effects of injury." (R. 26.)

It is true that in its statement of facts appellants' brief below (page 5) referred to and quoted only from

question 22 of Exhibit No. 4 and made no reference to question-answer 23 of Exhibit No. 4 or to question-answer 7-D of Exhibit "A". But appellants' brief did state that "the date of onset, appearing therein, was '12-29-45,'" and at pages 19-20 of appellee's brief below this matter was explained fully and in detail, so that we cannot understand how the court came into such substantial confusion in this respect.

2. The opinion also states that "* * * All the medical witnesses agree * * * that the fall was not the sole cause of death but that the pre-existing heart condition was at least a contributing factor." (R. 66); and

"* * *, but when the testimony of each of these medical witnesses is read as a whole, it is perfectly clear that each of them held the opinion that in 1945 the deceased was afflicted with an abnormal heart condition * * *, so that both physicians came to the conclusion that the death was the result of the combined effects of both causes * * *;" (R. 66-67); and

"Other uncontradicted medical testimony shows" that the thrombosis of 1942 was "caused or accompanied by an arteriosclerotic condition which persists and gives rise to further attacks." (R. 65.)

A. Testimony of Dr. Brunson

Dr. Brunson testified four different times, as clearly as a witness could, based on his personal attendance on and examinations of insured during the period of time in question, that, in his (Dr. Brunson's) opinion, insured was free and clear of any disease of the heart or arteries prior to the fall on December 6, 1945; that the fall caused a thrombosis that occurred on December 29, 1945, and caused death on that day:

(a) On direct: "Q. He came back from Columbia the week after the fall. Did you look after him after that? A. Yes, sir. I saw him each day after that. Q. What condition was he in, Doctor? A. Mr. Asbell was quite weak. He was pale. And he was suffering from shock apparently. He didn't have his usual strength or his cheerfulness or ability to get up and about. He was confined to the bed most of the time. Q. You know whether or not he ever got out of the house at all after—A. No, sir. Not that I know of. He didn't get out of his room. Q. Mrs. Asbell said his meals were served in the room. A. That is correct. Q. Had a nurse there? A. Had a nurse, yes, sir. Q. And you saw him daily? A. Yes, sir. Q. During that time, Doctor, did Mr. Asbell exhibit any evidence of a heart trouble? A. Not that I could tell, sir. Q. Did you examine him for—A. I examined him every time I went there. Q. The testimony here is that he passed away on the afternoon of December 29. Were you present when he died? A. Not when he died. But I saw him four times that day and it happened that I was away just at the time he passed out. Q. In your opinion what was the cause of his death? A. He died from coronary occlusion was what I think he died from. Q. What was that? A. I think it was caused from the accident; the shock of the accident. Q. By the accident, you mean the fall? A. The fall, yes, sir." (R. 49.)

(b) On direct, the court asked Dr. Brunson what he meant by "coronary occlusion," and after he had explained this the examination proceeded: "By Mr. Benet: And in your opinion that was caused by the fall? A. That was caused as a result of the fall, yes, sir." (R. 50.)

(c) On cross: "Q. Did he or did he not, Doctor, have an attack of coronary thrombosis in the early part of 1942? A. Not to my personal knowledge, but the report was that he had it, yes, sir. Q. And you have no quarrel with that

diagnosis, have you? A. Well, no, sir. I don't know for sure what it was. I mean to say, from personal knowledge he didn't have it. But from the report I got he did have it." (R. 55.)

(d) On re-direct: "Q. Mr. Black has asked you about Dr. Madden's diagnosis when Mr. Asbell was in the hospital in January of '42. Did you ever agree with that diagnosis? Well, sir, I didn't know of it so I don't say things for a fact that I don't know myself. Q. Therefore, you didn't agree with that diagnosis? A. I didn't find anything the matter with his heart myself. Q. You examined him a number of times? A. Yes, sir. Q. Did you ever find anything wrong with his heart? A. No, sir; never. Q. Therefore all this hypothetical line of questioning is not applicable because he hadn't had any former attack of coronary thrombosis or any other heart trouble so far as your examination showed, had he? A. No, sir." (R. 57.)

3. Dr. Brunson had testified on cross expressly contrary to the theory of the court below that there was an arteriosclerotic condition which persisted and gave rise to further attacks, to wit: "Q. And, Doctor, once you have an attack of coronary thrombosis and that is followed by a recovery, I want you to state whether or not the patient can expect to have further attacks of coronary thrombosis because of a diseased condition that is present? A. They may have or they may not. They sometimes get entirely well from it. * * * Q. Isn't it true that those who survive inevitably they will have further attacks unless death from some other cause takes them off? A. Not always. Some of them never have it any more. Q. Is it true that there is present a diseased condition once you have had an attack of coronary thrombosis, that you have a diseased condition of the heart? A. A diseased condition of the heart? Q. Yes,

sir. A. No; the heart gets well. Often entirely well." (R. 53.)

4. The opinion picks out one answer of Dr. Brunson on cross, apart from its context, and, based on this alone, holds that "it is perfectly clear that" Dr. Brunson was of opinion that the heart condition existed early in 1942 and persisted and operated as one of the causes of the death in December, 1945. (R. 66.)

We quote this segment of Dr. Brunson's testimony, emphasizing the question and answer referred to: "A. All right, sir. If he had coronary thrombosis then in 1942, four years later he had another attack of coronary thrombosis, wouldn't you say, sir, that he had a condition present in his heart that would give rise to that second attack of coronary thrombosis? A. I don't think so; not under the circumstances that the death occurred. Q. What is that? A. Not under the circumstances in which his death occurred. Q. **Doctor, if he had had a perfectly normal heart, is it your opinion that he would have had an attack of coronary thrombosis at that time? A. No, sir.** Q. You don't think so, do you? A. No, sir. Q. **Go ahead.** A. **What I was going to say,** I know that he suffered from shock and weakness and a very severe disability during the time of his illness and I believe that that brought the attack on." (R. 55-56.)

Dr. Brunson was trying to make clear his opinion, consistently with what he had already said, that insured had a perfectly normal heart prior to and up to the moment of the fall, but that the trauma and shock incident to the fall and the operation had injured or weakened insured's heart and coronary arteries, so that at the time of his death, twenty-two days after the fall and operation, insured did not have a perfectly normal heart. But opposing counsel was thinking and talking faster than the diffident and elderly Dr. Brunson. The Court will note that, just follow-

ing the particular answer, opposing counsel, because of his innate courtesy, realized that he had not given Dr. Brunson time to complete his answer to the question and that, when time was given, Dr. Brunson completed the statement of his opinion, consistently with what he had said four times before. The jury appraised this situation which is not reflected by the cold type.

5. Dr. Brunson did not volunteer the testimony "that he had not disputed the diagnosis," of thrombosis by Dr. Madden in January, 1942, which seems to have made a substantial impression on the court below. (R. 66.) This testimony came in on cross, in this way: "Q. Did you consult with Dr. Madden? A. I got a report from Dr. Madden. Q. Did he give a diagnosis of coronary thrombosis? A. Yes, sir; he did. Q. And did you take any exception to that diagnosis? A. No, sir, I didn't." (R. 55.)

The jury was entitled to gain the impression from Dr. Brunson's appearance on the stand that he was an elderly and modest gentleman in declining health and not temperamentally disposed to combat or dispute. Such impression did not militate against his veracity or ability.

Later, on re-cross, counsel, doubtless seeking to show some duty to speak in this respect, asked Dr. Brunson if he had not sent Mr. Asbell to see Dr. Madden in 1942. Dr. Brunson answered "No, sir. He went there of his own accord." (R. 57.) Dr. Madden's report was later sent to Dr. Brunson because the latter was Mr. Asbell's family physician. But the record does not suggest that Dr. Brunson ever came under any duty to speak with reference to Dr. Madden's diagnosis prior to the trial of these cases; much less does it suggest that he ever came under a duty to **dispute** the diagnosis. Dr. Brunson has been for more than forty years a general practitioner in a country town. Dr.

Madden is a diagnostician in the relatively large City of Columbia. When Dr. Brunson received Dr. Madden's report in early 1942 should he have *sua sponte* written a letter to Dr. Madden disputing the diagnosis, or should he have told Mr. Asbell that Dr. Madden's diagnosis was wrong? Where, when and why should Dr. Brunson have originated the dispute? We know of no rule of morals or law imposing this duty; is there any rule of medical ethics that required this? If so, this is not within our knowledge. If it was the personal theory of the court below, we submit that such theory is not based on the record in this case and that it was erroneously given effect as evidence.

B. Testimony of Dr. Madden

Dr. Madden wrote a letter to a local officer of The Mutual Life Insurance Company, dated February 14, 1946, evidently incident to proof of death, which he readily admitted and confirmed in every detail under oath on cross examination (R. 59-61). This letter was admitted in evidence without objection as plaintiff's Exhibit No. 5 and is printed at R. 24. The jury had a right to take this letter as a fair summary of Dr. Madden's testimony, made by himself prior to the commencement of litigation. We respectfully but earnestly ask the Court to read this letter carefully.

Dr. Madden wrote this letter *sua sponte,* in the calm and reflective atmosphere of his own office. His choice of language—"recovered completely," "full activity," "free of symptoms," "was getting along fine," "a very serious fracture"—was deliberate. He chose the most positive language. He referred to the "possibility of a **second** infarction," not "of the revival or recurrence" of a previous one; he closed "the series of events * * * **must** be con-

sidered as the cause of this man's death." (Emphasis added.)

Dr. Madden had not, on his direct examination, given opposing counsel much, if any, support on their necessary theory that the thrombosis of January, 1942, was due to an arteriosclerotic condition which persisted and contributed as an essential factor in the death. On re-direct opposing counsel made another effort to secure testimony from Dr. Madden in support of this theory, but met with even less success, to wit:

> "Q. Doctor, if a man has one attack of coronary thrombosis, what have you to say to the likelihood of his having any further attacks? A. He is likely to have another; not necessarily so, though."
>
> * * *
>
> "Q. Then, Doctor, is the statement in the letter which Mr. Benet presented you with, in your opinion he would be alive today, is that to any extent based on surmise and conjecture? A. Well, I think it is, but it is further based on the fact that on November 14, 1945, I had checked him over in my office and he was getting along extremely well; fine." (R. 61.)

We earnestly submit that, under the rule of the *Tennant case*, it was entirely within the province of the jury to find, (a) from the testimony of Dr. Brunson, that Mr. Asbell had never suffered from any abnormal heart condition prior to the fall, or, (b) from the testimony of Dr. Madden, that if Mr. Asbell had suffered a heart attack in January, 1942, he had fully and entirely recovered therefrom long prior to the fall, and that such disease did not contribute as an essential factor in his death.

C. Other Medical Testimony

Defendants offered two other medical witnesses, Dr. A. B. Josey, who had never seen Mr. Asbell and who testi-

fied purely as an expert and entirely on a hypothetical basis, and Dr. Charles A. Epting, orthopedic surgeon who performed the operation following the fall. Both were from Columbia. And the court below must have had Dr. Josey's testimony primarily in mind, because Dr. Josey was the only witness who developed the theme adopted by the court —that the thrombosis of 1942 was caused or accompanied by an arteriosclerotic condition, which persisted and contributed as an essential factor in the death. Dr. Josey also testified that a fall cannot cause coronary thrombosis in the normal heart. (R. 19-22.)

Appellants printed in their Appendix excerpts from Dr. Josey's testimony covering the above points (R. 19-22) but did not print any portion of his cross examination, which is found in the Reporter's Transcript at pages 103-107. This will show that Dr. Josey found it impossible to synchronize his testimony with that of Dr. Brunson, and particularly with that of Dr. Madden. His testimony was predicated on the hypothesis that Dr. Madden's testimony was correct, and Dr. Madden had testified that Mr. Asbell had "recovered completely" as of January 17, 1942, etc. Dr. Josey was finally forced into the position where he said he didn't question the facts of Dr. Madden's letter, but "I question the interpretation. Q. You don't question the fact, but you question the interpretation. What do you mean? A. The interpretation of what he meant by complete recovery." (Reporter's Transcript 105.) This cross examination closed with the following:

> "Q. Don't you know that Dr. Madden said when he examined Mr. Asbell the last time on November 14, 1945, which was not quite a month before the accident —you recall what he said his condition was at that time? A. I do, yes, sir. Q. What did he say? A. He said it was excellent. Q. Is there any better rating than

excellent for a man's physical condition? A. (No answer.)" (Reporter's Transcript 107.)

Dr. Epting contributed little except to testify as to the operation on December 7, 1945, and to give his opinion: "From my experience the accident of the injury to his elbow was not sufficient to have caused death. Note that I am saying from my experience because I am basing that on many other cases similar to this one." (R. 23.)

This other medical testimony was in direct conflict with the testimony of Dr. Brunson and Dr. Madden, either or both, so that the jury was entitled to disregard it under the rule of the *Tennant case.*

In addition to that, the jury was entitled to disregard this testimony, as well as any other portion of the medical testimony under the rule stated by Judge Anderson in *Aetna Life Ins. Co. v. Allen* (C. C. A.—1st), 32 Fed. (2) 490, which case was cited with approval and quoted from in *Life Ins. Co. of Va. v. Rhodes, supra* (C. C. A.—4th), 71 Fed. (2) 413, 414.

We quote two extracts from Judge Anderson's opinion:

"* * * But we think the jury were, as already noted, at liberty to disregard the conflicting and highly speculative theories of the experts, and to conclude that the *causa causans* of the death was the accident, effecting its fatal result in undetermined ways. It cannot be denied that the processes of life and of death are still, in their essential nature, unfathomed mysteries; that health and sickness are phenomena, the causes of which frequently remain unknown. The jury knew that Dority was hurt and died; they were warranted in finding that the hurt was the cause of his death, without also finding that the theory of bacterial infection, as a link between the hurt and his death, was established.

* * *

> "* * * In one aspect every death is 'caused' by heart failure. But in most cases involving human rights the real question is: What caused the heart to fail? Insurance companies cannot avoid liability under their contracts by confusing, through the speculative theorizing of experts, cause, condition, and effect. * * *"—32 Fed. (2d) 493-494.

The first of these extracts was quoted with approval by Judge Northcutt in his opinion in the *Rhodes case,* all of which was pointed out in appellee's brief below. We submit that the opinion here shows that the court below went entirely *contra* to this well-established rule in the construction and effect that it gave to the medical testimony, particularly that of Dr. Brunson and Dr. Madden.

Point II

The Court below erred in holding in effect that the jury should have "indolently accepted" the opinions of the physicians favorable to defendants, when the lay evidence alone was sufficient to support verdicts.

We submit that the jury was entitled to find from the lay testimony summarized *supra,* either taken alone, or taken in connection with the testimony of Drs. Brunson and Madden, either or both, that the injuries and shock resulting from the fall and the consequent operation were sufficient and did in fact cause the coronary occlusion or thrombosis that occurred on December 29, 1945, and which caused death on that day. The rule that the jury need not "indolently accept" the testimony of medical experts is quoted *supra* (in the petition) from *United States v. Gower* (C. C. A.—10th), 50 Fed. (2) 370, 371. That quotation shows that the rule is predicated in part on *Head v. Hargrave,* 105 U. S. 45, 47-49, 26 L. Ed. 1028, and The Conqueror, 166 U. S. 110, 133, 41 L. Ed. 937, 947. As the petition shows fur-

ther, this rule as laid down in the *Gouer case* has been cited and followed with approval in *Coyner v. U. S.* (C. C. A.—7th), 103 Fed. (2) 629, 633.

The latest and most complete statement of the rule that has come to our attention in any textbook is found in 32 C. J. S., p. 396, as follows:

> "Opinions of physicians or medical experts may constitute substantial evidence but the weight thereof is for the trier of the facts. Ordinarily an opinion is not conclusive even though uncontradicted unless it concerns a matter of science or specialized art of which a layman can have no knowledge. A medical opinion cannot stand when opposed to actual facts, physical laws, or matters of common knowledge. It is entitled to no value if it has no substantial basis or if it is based on an incorrect assumption of the facts."

We cited to the court below the following cases as judicial recognition of the rule that a jury in a case such as this is entitled to find, from evidence not as strong as that presented here, that trauma may cause a thrombosis that causes death. *Aetna Life Ins. Co. v. Allen, supra* (C. C. A.—1st), 32 Fed. (2) 490, and *Scanlan v. Metropolitan Life Ins. Co.* (C. C. A.—7th), 93 Fed. (2) 942; and two cases from the Supreme Court of South Carolina—*Westbury v. Heslep & Thomason Co.,* 199 S. C. 124, 18 S. E. (2d) 668, and *Buggs v. Rubber Co.,* 201 S. C. 281, 22 S. E. (2) 881.

Respectfully submitted,

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